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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GREEN CONSTRUCTION COMPANY, INC. AND UNITED STATES FIDELITY & GUARANTY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, p. 1a) is reported at 477 F. 2d 930. The Court of Claims' Order denying the parties' motions for reconsideration (App. B, *infra*, p. 13a) is unreported.

JURISDICTION

The opinion of the Court of Claims (App. A, *infra*, p. 1a) was entered on May 11, 1973, and a motion for reconsideration was denied (App. B, *infra*, p. 13a) on September 28, 1973. On January 3, 1974, the Chief Justice extended the time within which to file a peti-

tion for a writ of certiorari to January 26, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

1. Whether the Court of Claims exceeded its jurisdiction under the Wunderlich Act by deciding a question of liability and by ordering the responsible contract appeals board to adjudicate the resultant damages, notwithstanding (1) that the contractor had never pursued the exclusive administrative remedy provided by the Disputes clause of its government contract, (2) that the 30-day period for filing an administrative appeal provided by the contract had expired more than five years before the filing of the petition in the Court of Claims, and (3) that the Government had not yet filed an answer to the petition or had any other opportunity to contest the factual allegations therein.

STATUTE INVOLVED

The Act of August 29, 1972, Public Law 92-415, 86 Stat. 652, amending 28, U.S.C. 1491, with respect to the Court of Claims provided in pertinent part:

> In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

STATEMENT

During the period 1964–1966, the William Green Construction Company, Inc. ("Green"), entered into three separate construction contracts with the United States, through the General Services Administration

("GSA").[1] The contracts called for the construction of, respectively, a dormitory on the campus of Howard University (the "Howard" contract), a post office and federal office building in Portsmouth, New Hampshire (the "FOB" contract), and a training school facility in West Virginia (the "Training School" contract). In 1966, a dispute arose between Green and GSA concerning the specifications for the Howard contract. Green maintained that the specifications were defective and impossible to carry out, and therefore refused to proceed with construction of the building. The contracting officer ruled that Green's refusal to go forward was unjustified, and terminated that contract pursuant to its Default clause (App. A, *infra*, pp. 1a–2a).[2]

[1] This statement of facts is based upon the opinion of the Court of Claims and the two decisions of the GSA board of contract appeals, *Appeal of William Green Construction Co.*, 68-1 BCA ¶ 6883; *Appeal of William Green Construction Co.*, 71-2 BCA ¶ 9116. Since the opinion of the Court of Claims arose on the Government's motion to dismiss the petition, there has as yet been no factual finding as to whether the Government's wrongful termination of the Howard contract caused any of the damages claimed. Indeed the court's resolution of this factual question in the context of a motion to dismiss is one of the bases of this petition for a writ of certiorari (see *infra*, pp. 13–14).

[2] Paragraph 5 of the Howard contract (Standard Form 23A, April 1961 ed., General Services Administration) as modified on a page entitled "Modification of General Provisions" (Standard Form 23–A) provides:

"5. TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS

"(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any

extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the Government resulting from his refusal or failure to complete the work within the specified time.

"(b) If fixed and agreed liquidated damages are provided in the contract and if the Government so terminates the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

"(c) If fixed and agreed liquidated damages are provided in the contract and if the Government does not so terminate the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

"(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

"(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

"(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the con-

Thereafter, according to the allegation in Green's petition in the court below, GSA advised Green that GSA intended to set off, against amounts otherwise payable to Green under the other two contracts, the liquidated damages and excess completion costs arising out of the termination of the Howard contract. Green contested GSA's right of set-off, alleging that GSA's termination of the Howard contract had been improper, and that a set-off would not only make it financially impossible for Green to complete the FOB and Training School contracts, but moreover would put Green out of business altogether. When GSA al-

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tract), notifies the Contracting Officer in writing of the causes of delay.

"The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6 of these General Provisions.

"(e) If, after notice of termination of the Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the Government, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled DISPUTES."

[The Howard contract does not contain a clause providing for termination for the convenience of the Government.]

legedly refused to disclaim its right to set off the amounts involved, but before any set-off was actually imposed, Green discontinued work on the FOB and Training School contracts, and the contracting officer subsequently terminated those contracts pursuant to their respective Default clauses (App. A, *infra*, p. 2a).[3]

The Howard, FOB and Training School contracts all contained the standard "Disputes" clause [4] which,

[3] The Default clauses in the FOB contract (as modified) and the Training School contract were identical to the Default clause contained in the Howard contract (as modified).

[4] Paragraph 6 of the Howard contract (Standard Form 23-A, April 1961 ed., General Services Administration) provides:

"6. DISPUTES

"(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: *Provided, however*, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with

inter alia, affords a contractor the right to appeal a default-termination decision to the appropriate government contract appeals board within thirty days of termination, but which further provides that the decision of the contracting officer terminating the contract, if not appealed within thirty days, is final and conclusive.

Green timely appealed the termination of the Howard contract, and in the Howard appeal, Green also asserted claims for unliquidated damages for breach of contract. The GSA board of contract appeals held in 1968 that Green's claim under the Howard contract must be limited to only that recovery prescribed by the Howard contract for improper default-terminations, *i.e.,* an equitable adjustment, and, accordingly, the Board dismissed from the Howard appeal Green's breach of contract claims. *Appeal of William Green Construction Co.,* 68–1 BCA ¶ 6883.[5] Subsequently, in 1971, the GSA board of contract appeals, pursuant to the Government's stipulation that it had erroneously cancelled the Howard agreement, ruled that the Howard contract had been improperly terminated and remanded the matter to the contracting officer for the required equitable adjustment. *Appeal of William Green Construction Co.,* 71–2 BCA ¶ 9116. Green never

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the performance of the contract and in accordance with the Contracting Officer's decision.

"(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law."

[5] See note 2, par. 5(e), *supra,* p. 5.

independently appealed the validity of the default-termination of the FOB or Training School contracts in the manner prescribed by the Disputes clause.

In 1972, Green brought this independent action in the Court of Claims claiming damages on the theory that GSA had breached the Howard, FOB and Training School contracts. As the basis of its claims on the FOB and Training School contracts, Green alleged that the Government had compelled it to discontinue performance of those contracts by threatening to set off, against amounts payable thereon, the losses incurred by the Government on the Howard contract (App. A, *infra,* pp. 3a–4a).

In ruling on the Government's motion to dismiss the petition, the court recognized that the Disputes clause procedure of the contracts was applicable and that the exclusive remedy available to Green was an appeal to the GSA contract appeals board, since "[t]hat was the channel expressly marked out by the contract and it should have been followed" (App. A, *infra,* p. 5a). The court dismissed the petition as it applied to the Howard breach of contract claim, noting that the equitable adjustment Green was then receiving administratively was all it was entitled to. (App. A, *infra,* p. 5a). However, instead of dismissing the petition as it pertained to the FOB and Training School contracts, the court ordered the board to hear Green's appeal, notwithstanding the fact that the 30-day period provided by the contracts for an administrative appeal had expired in 1966, more than five and a half years before the 1972 filing of Green's petition in the Court of Claims. In support of this

action the court held that it had the power to remand a case to the board with directions to process an administrative appeal regardless of its timeliness (App. A, *infra*, p. 9a). Further, notwithstanding that the case was before it only for consideration of the Government's motion to dismiss and that no evidentiary proceedings had ever taken place, the court found that the GSA's threat of set-off induced Green to discontinue performance and that GSA had wrongfully terminated the FOB and Training School contracts.[6] The court therefore remanded the case to the appeals board to determine only the actual recovery due Green.

REASONS FOR GRANTING THE WRIT

The decision below constitutes an erroneous expansion by the Court of Claims of its own jurisdiction under the Wunderlich Act (41 U.S.C. 321, 322), which seriously threatens the integrity of the administrative appeals procedure, and seriously impairs the government's ability to settle disputes under its contracts promptly and conclusively.

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[6] In this respect the court stated (App. A, *infra*, p. 10a):

"There has, as yet, been no decision that the termination of the FOB agreement was improper, but we think that on the undisputed facts there is no doubt that it was, and we now so hold as a matter of law since the board could not validly decide otherwise. All must now accept the Howard termination as incorrect; Green was not in default on that project and the default-termination was erroneously made by the contracting officer. There were, accordingly, no liquidated damages and no excess construction costs which could properly be offset against the FOB and Training School contracts. That threats to offset were nevertheless made is undisputed and indisputable. The connection is also clear between those threats and Green's stopping work on the FOB and Training School projects."

In *United States* v. *Anthony Grace & Sons*, 384 U.S. 424, this Court ruled that the jurisdiction of the Court of Claims under the Wunderlich Act, to review disputes covered by the Disputes clause of government contracts, is limited to those cases where the contractor has exhausted its administrative remedies, and has thus obtained an administrative determination of the merits of its claim. As this Court has stated, review by the Court of Claims on a question arising under a Disputes clause "must rest solely on consideration of the record before the department." *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 714. The decision of the court below represents a serious departure from this jurisdictional principle in holding that (1) the contractor need not exhaust his administrative remedies within the period mutually agreed upon in the contract, and (2) that the court has authority to decide the merits of the contractor's claim in the absence of a previous administrative determination of that question, and indeed in the absence of any factual record or findings on which to base the court's decision. Review by this Court is therefore warranted.

1. In an unbroken line of cases extending over half a century, this Court has repeatedly emphasized that a government contractor is bound by his agreement to observe the remedial provisions set forth in the contract, and that the courts lack power to grant any relief in derogation of those provisions. See, *e.g.*, *Kihlberg* v. *United States*, 97 U.S. 398; *Sweeney* v. *United States*, 109 U.S. 618; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U.S. 549; *United States* v. *Moorman*, 338 U.S. 457; *United States* v. *Carlo Bianchi &*

Co., supra. Thus when, as here, a contractor has failed to pursue the remedies stipulated in his agreement with the Government, the courts are obliged to "outlaw his claims, whatever may be their equity." *United States* v. *Holpuch Co.,* 328 U.S. 234, 240; *United States* v. *Blair,* 321 U.S. 730; *United States* v. *Callahan Walker Co.,* 317 U.S. 56.

The court below held that it possessed jurisdiction to compel the appeals board to give the contractor a "second chance" (App. A, *infra,* p. 9a) to assert its claims before the board, notwithstanding that the 30-day period for taking such an appeal had expired and the contractor has been afforded a full opportunity to pursue an appeal within the stipulated time. In so holding, the Court of Claims has fashioned a rule which threatens a particularly significant aspect of the remedial mechanism set forth in government contracts. The manifest purpose of the 30-day appeal period is to promote the security of transactions by insuring that the decisions of contracting officers, if not contested within the agreed-upon period, may be regarded as no longer subject to dispute. This policy therefore permits government agencies to fix a date certain upon which contractual matters, once potentially subject to challenge, may be treated as finally closed.[1]

[1] The decision below is thus also inconsistent with court of appeals holdings that contracting officers' determinations become final if a timely appeal is not taken. *United States* v. *Hammer Contracting Corporation,* 331 F. 2d 173 (C.A. 2); *United States* v. *Ulvedal,* 372 F. 2d 31 (C.A. 8); *United States* v. *Peter Kiewit Sons' Co.,* 345 F. 2d 879 (C.A. 8).

The court below did not conclude that the appeal procedure here was inadequate or unavailable. Rather, in the court's view, Green's omission to pursue a timely appeal was sufficiently excused by Green's allegation that, in its challenge to an entirely different agreement (the Howard contract), Green had sought to recover consequential damages for the losses on the FOB and Training School contracts. There are, however, many circumstances in which a contractor with a colorable claim can supply a plausible reason, similar to that presented here, for its failure to observe the terms of the contract. If such reasons are now to be entertained as a basis for determining whether contractual issues should be reopened years after the prescribed period for asserting claims under the contract has expired, the principle of finality incorporated into the parties' agreement will be severely impaired.

2. As authority for its ruling in this case, the Court of Claims relied upon its earlier, more limited decisions,[8] and upon a recently enacted statute which permits the Court of Claims to remand cases to appeals boards "[i]n any case within its jurisdiction" (P.L. 92–415, 86 Stat. 625, *supra*). The jurisdiction of the Court of Claims, however, is limited by the Wunder-

[8] *Maney Aircraft Parts, Inc.* v. *United States*, 197 Ct. Cl. 159, 453 F. 2d 1260 (1972); *Monroe M. Tapper & Associates* v. *United States*, 198 Ct. Cl. 72, 458 F. 2d 66 (1972), where the court held that appeals boards have authority to waive the contractual appeal period.

lich Act, 41 U.S.C. 321, 322, which confers review authority upon the court only when the contractor has exhausted his contractual remedies by appeal to the contract appeals board—a prerequisite which Green did not meet here. *United States* v. *Anthony Grace & Sons, supra; United States* v. *Carlo Bianchi & Co., supra.* Thus, the purpose of the new statute was not, as the court's ruling implies, to abrogate the terms of the Disputes clause. Rather it was intended simply to cure the question left open in *United States* v. *Carlo Bianchi & Co.* as to whether the Wunderlich Act permitted the Court of Claims, in cases otherwise properly before it, to remand cases back to contract appeals boards in order to supplement a defective record.[9] 373 U.S. at 717–718. Accordingly, there is nothing in this new statutory enactment to support the Court of Claims' serious departure from long-established jurisdictional principles.

3. The Court of Claims used its waiver of the 30-day appeal period as a vehicle for a second equally serious incursion into the board's jurisdiction. Having first ordered the board to adjudicate Green's claim, the court proceeded to determine the merits of Green's claim prior to any administrative ruling having been made by the GSA contract appeals board, and in fact without the benefit of any evidentiary proceedings

[9] See, *e.g.*, H. Rep. No. 92–1023, 92d Cong., 2d Sess., p. 4, where the Congressional purpose to modify the *Bianchi* case in this respect is expressly stated.

having taken place.[10] The court held that the Government had wrongfully default terminated both the FOB and Training School contracts and, in connection with the holding, the court found that Green's failure to proceed with those contracts was caused by the contracting officer's "threat" to set off against those contracts, the Government's claims for liquidated damages and excess completion costs on the terminated Howard contract. These determinations by the court are in direct contravention of the doctrine set out in *United States* v. *Anthony Grace & Sons, supra,* and *United States* v. *Carlo Bianchi & Co., supra,* that the sole function of the Court of Claims in cases under the Wunderlich Act is to review decisions of contract appeals boards on the record compiled in the proceedings before such boards, and that the court is thus precluded from adjudicating the case *de novo.*

The Court erred even more fundamentally here, however, by making the foregoing determinations solely on the basis of factual allegations in the contractor's petition which the Government had not yet had an opportunity to contest and which the Government has a substantial basis for contesting and intends to contest if it is afforded an opportunity to do so. The Government's Motion to Dismiss for failure to state a claim explicitly stated (at p. 3) that "[t]he facts

[10] The case was before the court on the Government's motion to dismiss the petition for failure to state a cause of action upon which relief could be granted. The Government has never filed an answer to the petition.

as stated in the petition" were "assumed [to be] correct for the purposes of this motion only * * *." It pointed out (at p. 1) that the Government had not yet answered the petition. The Court of Claims' opinion ruling on the motion to dismiss deprives the Government of any opportunity to do so and "remands" the case to the board for administrative proceedings to be conducted in accordance with the court's determinations of what it called "undisputed facts" (App. A, *infra*, p. 10a). But the Government does wish to dispute those factual allegations and had no opportunity in the Court of Claims to "even hint that this stoppage was unrelated to, or had some cause other than, the menace of set-off" (*ibid.*).[11] The fact that, under other aspects of the court's decision, the parties would now have to undertake to contest those factual allegations so many years after termination of the contracts involved is obviously not the fault of the Government, but is, instead, a function of the court's other errors in the case. Indeed, the very staleness of the evidence to be considered underlines the importance of maintaining the principle that claims under the contract must be asserted within the time period, and in the manner, prescribed in the parties' agreement.

[11] The correspondence attached to the petition to which the court refers (App. A, *infra*, p. 10a, n. 6) is not the only correspondence in the Government's file, or the only potential evidence, which bears on the factual allegations in the petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
IRVING JAFFE,
Acting Assistant Attorney General.
ROBERT E. KOPP,
ROBERT S. GREENSPAN,
THOMAS W. PETERSEN,
LESLIE H. WIESENFELDER,
Attorneys.

JANUARY 1974.

APPENDIX A

In the United States Court of Claims

No. 124–72

(Decided May 11, 1973)

WILLIAM GREEN CONSTRUCTION COMPANY, INC. AND UNITED STATES FIDELITY & GUARANTY COMPANY v. THE UNITED STATES

James V. Dolan, for plaintiff; *Stanley C. Morris, Jr.*, attorney of record. *Richard A. Behrens, Michael Malley* and *Steptoe & Johnson*, of counsel.

Judith Ann Yannello, with whom was *Assistant Attorney General Harlington Wood, Jr.*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

ON DEFENDANT'S MOTION TO DISMISS THE PETITION

DAVIS, *Judge*, delivered the opinion of the court:

Three separate government construction contracts are interlaced in this case. In November 1964 plaintiff William Green Construction Company (Green) agreed with the General Services Administration to build a women's residence hall at Howard University in the District of Columbia (the Howard University contract). About the same time Green also contracted with GSA to construct a Post Office and Federal Office Building in Portsmouth, New Hampshire (the FOB contract). A year and one-half later, the same agency arranged with plaintiff Green to erect the National Training

School for Boys in Morgantown, West Virginia (Training School contract). Plaintiff United States Fidelity & Guaranty Company (USF&G) was the surety on the Howard University and FOB contracts; another company was surety on the Training School agreement. Green was also working, during this period, on three nonfederal projects on which USF&G was surety.

In 1965–1966, during performance of the Howard University work, the contractor and the defendant had a serious dispute whether certain of the government specifications were defective and impossible to carry out. When Green refused on that ground to go forward, the contracting officer terminated for default. Green challenged this determination, insisting that its inability to proceed was justified by the defects in the defendant's requirements.

In the discussions which followed, defendant indicated that it intended to set off, against amounts which would be owing on the other two of Green's federal contracts, the liquidated damages and excess completion costs assessable with respect to the just-terminated Howard University agreement. Green responded that such set-offs were improper—because the default-termination was unwarranted—and would make it financially impossible to proceed with completion of the other two contracts, and, more than that, the contractor's entire business would be destroyed. For this reason, Green and USF&G asked the GSA to isolate the Howard University dispute and not to impose set-offs, but the Government refused to make such a commitment.

Shortly after the Government had made it clear that it fully maintained its right of set-off, but before any set-off had actually occurred, Green informed GSA that, because of the threat to reduce payments on the other projects, it was financially unable to, and would not, proceed with the FOB and Training School contracts. These two agreements were then terminated by the Government for default. USF&G completed the FOB work, and apparently the other surety did the same for the Training School contract. Green likewise failed to complete the three nonfederal contracts it had, and went out of business.

Green appealed to the General Services Board of Contract Appeals from the default-termination of the Howard University contract, but it never sought review by the Board of the defaults with respect to FOB and Training School. The Howard appeal asked, not only for the conventional modern adjustment for an improper default-termination,[1] but also for damages for losses on FOB and Training School, as well as on the nonfederal projects, and for loss of Green's business as a whole. Because of the inclusion of these items of recovery, the Government moved the board to dismiss the appeal as for "breach of contract" and "unliquidated damages", beyond the board's authority. In 1968 the board partially granted this motion, dismissing all claims except that for an equitable adjustment under convenience-termination standards.

Later, in 1971, the parties stipulated before the board that Green "was not in default at the time it received notice of the termination [of the Howard University contract] and the Government concedes the termination for default was erroneously made by the contracting officer. The appeal, therefore, should be granted as defined by the prior decisions of the Board in this case." The GSBCA then found that the contractor's "right to proceed under the contract was improperly terminated for default", and remanded to the contracting officer to determine the equitable adjustment for the unreimbursed costs of performing the Howard work. The stipulation expressly provided that "any equitable adjustment under the contract shall not be prejudicial to [the contractor's] right to proceed in the Court of Claims for additional damages not the subject of such equitable adjustment." GSBCA No. 2114, 71-2 BCA ¶ 9116.

In 1972 Green and USF&G brought this action, alleging what we have thus far set forth, asking for the large damages (over $2,700,000) the board had dismissed from the Howard appeal, and claiming that those damages are recoverable on the theory that the United States breached all three of Green's federal contracts. Count I of the petition asserts the

[1] The Howard contract provided that, if the default-termination was erroneous, the contractor would be entitled to an equitable adjustment—the equivalent of treatment as a convenience-termination. *See infra.*

full claim as a breach of the Howard contract, while Count II bottoms the very same claim on alleged breach of the FOB and Training School agreements. Defendant has moved to dismiss the petition for failing to state any proper claim.

We think that the claimants do not have a "breach" claim against defendant on any of the three contracts, but that plaintiff Green does have a right to a convenience-termination type of equitable adjustment, under all three of them, and that such adjustments should be awarded administratively. We discuss the three agreements *seriatim*.

Howard University contract (*Count I*): The defendant's notice of default-termination of the Howard contract triggered the default-termination clause which provided that, if it was determined for any reason "that the Contractor was not in default under the provisions of this clause", or that "the delay was excusable", the matter was to be treated as a convenience-termination if the contract contained a convenience-termination article, and, if not, the contract was to "be equitably adjusted to compensate for such termination." We have held that the latter alternative calls for the general equivalent of a convenience-termination award. *General Builders Supply Co.* v. *United States*, 187 Ct. Cl. 477, 409 F. 2d 246 (1969).

It follows that when the GSBCA determined that Green's right to proceed was wrongfully ended, and remanded for an appropriate adjustment, the contractor received the maximum to which it was entitled under the contract. There is no present complaint as to the amount of the equitable adjustment, and plaintiffs do not contend that such an award can or should cover the types of consequential damage they seek here. The petition suggests, however, that a breach claim for a wrongful default-termination somehow survived for these additional items of recovery.

But it is very plain under our decisions that the administrative remedy is the only one available to the contractor. Green does not retain a "breach" claim, for an improper default, which can be brought in court and through which a supplemental award can be obtained. *See General Builders Supply Co.*, *supra*, 187 Ct. Cl. at 480 n.3, 409 F. 2d at 248 n.3; *G. C. Casebolt Co.* v. *United States*, 190 Ct. Cl. 783,

786-87, 421 F. 2d 710, 712 (1970). The exclusive remedy "under the contract" substitutes for the "breach" claim which would otherwise exist, and becomes the claimant's sole form of relief. The measure of recovery for a convenience-termination—costs incurred, plus a reasonable profit on work performed—is an adequate replacement for the common-law cause of action. *See infra.*

It is worth noting, in addition, that in any event the type of consequential damage for which plaintiffs now press could not be obtained under Count I even if there were no such default-termination clause in the contract and this suit were properly one for common-law breach for wrongful cancellation of the Howard University pact. On the face of the petition it was not the wrongful termination itself which caused either Green's inability to proceed on the other two federal contracts, or the stoppage of work on the three nonfederal projects, or plaintiff's eventual going-out-of-business, but the subsequent and separate threat of set-offs against payments owing on the FOB and Training School projects. Whatever else those threats may have been, they were in no way violations of the Howard contract, nor were they directly or integrally linked to the Howard default termination. They were, instead, independent acts of the Government directed to the other two federal projects.

Accordingly, defendant is quite right that Count I fails to state any claim at all and must be dismissed *in toto*. The equitable adjustment which Green is receiving, through the administrative proceedings, is all that it merits with respect to the Howard contract.

FOB contract (Count II): A. Even if the default-termination of the FOB agreement was invalid, Green should have appealed to the GSBCA, just as it sought review of the Howard termination. That was the channel expressly marked out by the contract and it should have been followed. If the FOB termination was improper, an equitable adjustment would be made under that contract which embodied the same default-termination form as the Howard agreement.

Plaintiffs try to avoid this conclusion by a number of arguments which we must reject. The first is that the claim in Count II is not for wrongful termination but for anticipa-

tory breach of the FOB contract, through refusal to make progress payments. This is but a choice of phrasing to camouflage the irrefutable fact that the only detriment which came, or could come, to plaintiffs would be through a wrongful default-termination. Neither claimant suffered harm from the mere threat to withhold payment; neither would have suffered the harm charged from an actual withholding, if that is all there were. The injury could only come if the Government insisted that plaintiffs continued to have obligations under the FOB contract. If, for instance, the GSA had acquiesced (after the set-off threat) in Green's abandonment of the FOB project, the denial of progress payments would not interfere with performance because there would be no further work to be done or paid for. A failure to issue a default-termination would amount to an acquiescence in abandonment. *Cf. Ling-Temco-Vought, Inc.* v. *United States*, 201 Ct. Cl. —— (Mar. 1973). Thus, it was only the defendant's insistence, via the default-termination notice, that plaintiffs continued to have obligations under the FOB contract which precipitated any of the harms alleged. That was the heart of the matter.

As in *Allied Paint Mfg. Co.* v. *United States*, 200 Ct. Cl. ——, 470 F. 2d 556 (Dec. 1972), the contractor could have attacked the termination, through an appeal to the GSBCA, on the ground that other acts of the Government (*i.e.*, the threats of set-off) excused Green's failure to proceed.[3] Another comparable case is *Nolan Bros., Inc.*, v. *United States*, 186 Ct. Cl. 602, 405 F. 2d 1250 (1969), in which we held that a convenience-termination subsumed and obviated an independent breach claim for defective design. We pointed out, in words directly applicable to the present case, "If the Government, as it might have done, had terminated the contract for default because plaintiff lagged (on account of the defective specifications) and the default was found excusable (as due to the defendant's own fault), the termination would be converted, under the default clause, into a

[3] In *Allied Paint Mfg. Co.*, as here, the contractor's position was that the default-termination was improper because wrongful acts of the GSA in the administration of other contracts adversely affected the claimant's ability to perform all of its contracts, including those terminated.

convenience-termination * * *", with the plaintiff recovering costs incurred plus a measure of profit, but not unearned profits. 186 Ct. Cl. at 607, 609–10, 405 F. 2d at 1253, 1255. Plaintiff's so-called "breach" claim has, in short, no viability independent of the validity of the default-termination, and that could be readily challenged through the "disputes" procedure.[8]

A second of claimant's positions is that the entire termination-and-disputes remedy was aborted before the default notice. In *Nolan Bros., Inc., supra*, 186 Ct. Cl. at 609 n. 5, 405 F. 2d at 1255 n. 5, we set apart "a case in which the contractor treats a government breach of warranty as ending the entire contractual relationship before the defendant attempts to exercise its right of termination." Plaintiffs say that that is what happened here—that the whole contract was effectively ended before the default-termination—but their current stance is conclusively refuted by the significant fact that USF&G undertook to complete the FOB project after the termination. If the contract was not subsisting at that time, neither Green nor USF&G would have been under any obligation; the existence of the contract was the essential predicate for the surety's agreement to complete. As in *Nolan*, we cannot see the plaintiffs had put an end to, or thought that they had put an end to, the contract before the Government invoked the default clause.

The third point is that the set-off threats constituted a cardinal change, by effectively deleting the progress payment provisions of the FOB contract, and that a cardinal change is redressable only in court, not administratively. *See Edward R. Marden Corp.* v. *United States*, 194 Ct. Cl. 799, 442 F. 2d 364 (1971). We do not agree that it is a contract change of any kind—cardinal or ordinary—for the Government to set-

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[8]Plaintiffs complain that in order to obtain relief from the FOB and Training School defaults, they would have to show that the Howard default was improper—and "only under the Howard University contract could Green obtain the threshold determination (setting aside the Howard default) which was essential to obtaining any relief" under the other two agreements. But there was nothing to prevent Green from asking the GSBCA to suspend proceedings in the FOB and Training School cases to await the Howard determination. That is a very common practice where a significant issue in one matter depends upon the resolution of another case.

off against progress payments (let alone merely threatening to set-off) a federal claim on another contract (with the same contractor) which is believed in good faith, but mistakenly, to be valid. This is simply an exercise of the established right of set-off (*see United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947); *Burlington Northern Inc.* v. *United States*, 199 Ct. Cl. , 462 F. 2d 526 (July 1972)), which is not transformed into something else because the defendant's claim turns out later to be without merit.

In any event, and assuming for argument's sake that the threats of set-off did equal a cardinal change excising the progress-payment provisions, it does not follow that such a "breach" claim would be any different from the "breach" claim in this case for simple violation of the progress-payments clause. As we have pointed out, that claim is swallowed up by the default-termination which was the event causing plaintiffs' detriment. Violation of the payments article, or even its deletion, would not have brought about the chain-of-events asserted by Green and USF&G if it were not for the default-termination. From claimants' viewpoint that was the real villain in the drama, whom they should have pursued on his own scene.

Lastly, we are told that an equitable adjustment of the convenience-termination type does not give full enough relief for the injuries suffered, and therefore plaintiffs should be allowed to seek, through this court, the part of the remedy which the administrative award cannot give them. The answer is that the premise is incorrect. "The only substantial difference between the sum calculated under" equitable adjustment or convenience-termination standards "and the amount recoverable in a common law action for contract breach is the non-inclusion in the former of anticipated but unearned profits." *Nolan Bros., Inc.* v. *United States*, *supra*, 186 Ct. Cl. at 607, 405 F. 2d at 1253. This exclusion from relief of unearned profits is a settled policy which has long been accepted and enforced. 186 Ct. Cl. at 608–09, 405 F. 2d at 1254–55; *General Builders Supply Co.* v. *United States*,

supra, 187 Ct. Cl. at 485–86, 409 F. 2d at 251; *G. C. Casebolt Co* v. *United States*, *supra*, 190 Ct. Cl. at 788, 421 F. 2d at 713. And even in a common-law suit there would be no recovery for general loss of business, the claimed loss of the entire Green net worth, and losses on the non-federal work—such damages are all deemed too remote and consequential. *See Ramsey* v. *United States*, 121 Ct. Cl. 426, 433–35, 101 F. Supp. 353, 357–58 (1951), *cert. denied*, 343 U.S. 977 (1952); *Dale Constr. Co.* v. *United States*, 168 Ct. Cl. 692, 738 (1964); *Specialty Assembly & Packing Co.* v. *United States*, 174 Ct. Cl. 153, 175, 355 F. 2d 554, 567–68 (1966). The conclusion must be that the administrative remedy is, as we have already said, a full and permissible substitute for the award of damages under the former "breach" claim.

Plaintiffs err therefore in seeing themselves as under no duty to proceed administratively. On the contrary, Green should have appealed from the default-termination of the FOB contract and obtained its relief in that fashion.

B. Not unexpectedly, the defendant suggests that, having failed to appeal, Green is now barred forever. We follow, instead, the rule of *Zidell Explorations, Inc.* v. *United States*, 192 Ct. Cl. 331, 335–36, 427 F. 2d 735, 737–38 (1970), that, if the circumstances warrant, we will give a contractor who has failed to appeal a second chance. The time-limit for appeals to contract appeals boards is not beyond enlargement (*Maney Aircraft Parts, Inc.* v. *United States*, 197 Ct. Cl. 159, 453 F. 2d 1260 (1972); *Monroe M. Tapper & Associates* v. *United States*, 198 Ct. Cl. , 458 F. 2d 66 (April 1972)), and the Act of August 29, 1972, Pub. L. No. 92–415, 86 Stat. 652, gives us power to remand to a board "with such direction as it [the court] may deem proper and just."

To our mind this is a case, like *Zidell*, in which we should not rigidly hold the contractor to its original decision not to appeal. The three federal contracts were linked in plaintiff's mind and it may have considered the enlarged recovery it originally sought in the Howard administrative proceedings to be a sufficient method of covering all three determina-

tions.[4] Then, too, plaintiff may well have been misled by its view, still strenuously espoused here, that its claims are entirely "breach" claims for court trial. We referred in *Zidell* to the great confusion since *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963), over which cases properly fall "under the contract" and which are for "breach". This case is a prime exemplar. Especially since plaintiffs appear to have a valid right to substantial further relief, they should not be eternally punished for their initial mistaken choice of procedure.[5] The case should go to the GSBCA for processing under the default-termination clause of the FOB contract.

c. There has, as yet, been no decision that the termination of the FOB agreement was improper, but we think that on the undisputed facts there is no doubt that it was, and we now so hold as a matter of law since the board could not validly decide otherwise. All must now accept the Howard termination as incorrect; Green was not in default on that project and the default-termination was erroneously made by the contracting officer. There were, accordingly, no liquidated damages and no excess construction costs which could properly be offset against the FOB and Training School contracts. That threats to offset were nevertheless made is undisputed and indisputable. The connection is also clear between those threats and Green's stopping work on the FOB and Training School projects. Defendant does not even hint that this stoppage was unrelated to, or had some cause other than, the menace of set-off.[6] Nor is there any suggestion that plaintiffs are mistaken when they say they warned the defendant that they would need the progress payments on the

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[4] The FOB and Training School contracts were terminated in 1966. It was not until 1968 that the GSBCA dismissed, from the Howard appeal, the claims relating to the other two contracts. By that time the time for appealing the FOB and Training School defaults had long expired.

[5] The cases in which we refused contractors a second choice—*Briscoe* v. *United States*, 194 Ct. Cl. 866, 887–88, 442 F. 2d 953, 966 (1971); *Richardson Camera Co.* v. *United States*, 199 Ct. Cl. , 467 F. 2d 491 (Oct. 1972)—presented very different facts and circumstances.

[6] The petition reproduces a letter from Green committing it to continue performance on the FOB and Training School contracts provided that GSA agreed not to offset claims unrelated to those two projects.

two contracts, without substantial diminution.[7] There is, moreover, not the slightest basis for thinking that Green should (or could) have gotten the necessary money from other sources.

It follows, we think, that Green's refusal to proceed on FOB must now be held to be excused. A serious threat in these circumstances to withhold necessary progress payments because of an erroneous off-set claim on another contract is an act of the Government, not attributable to the contractor, which excuses whatever technical default there may be. Construction contractors cannot be expected to continue working if the Government improperly holds back on substantial interim payments which enable the project to proceed. *Cf. Litchfield Mfg. Corp.* v. *United States*, 167 Ct. Cl. 604, 338 F. 2d 94 (1964); *Pigeon* v. *United States*, 27 Ct. Cl. 167, 175–76 (1892); *Overstreet* v. *United States*, 55 Ct. Cl. 154, 173–74 (1920).[8]

D. The equitable adjustment to which Green is entitled under the FOB contract includes, not only the costs it incurred itself before termination, but also USF&G's excess costs in completing the project. Defendant admits[9] that, when a default-termination is converted to a convenience-termination, the contractor is entitled to any liquidated damages and reprocurement costs paid following the termination. That would include, since the surety stands here in the contractor's place,[10] USF&G's unreimbursed excess com-

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[7] The petition sets forth a pre-termination letter from counsel for USF&G to GSA saying explicitly that "if the Government off-sets its claims arising out of the Howard University contract against funds earned by the Green Company on other contracts, the Green Company will be unable to proceed with work on the contracts not in dispute for lack of funds to pay laborers and materialmen."

[8] Green might have waited until a set-off was actually made, but the GSA's intention had been made very plain and there apparently was planning and preparation work to do which would be entirely wasted if plaintiffs were not going forward once a set-off was actually made. In the circumstances we do not think Green was compelled to await an actual set-off.

[9] See Defendant's Reply to Plaintiffs' Response In Opposition to Defendant's Motion to Dismiss, at 9 n.6.

[10] USF&G has paid all laborers and materialmen, and Green is liable to USF&G for the full amount of the loss suffered in completing the FOB contract.

pletion costs, if appropriate and reasonable. *Cf. J. D. Hedin Constr. Co.* v. *United States*, 197 Ct. Cl. 782, 790–803, 456 F. 2d 1315, 1320–27 (1972). The equitable adjustment called for by the contract is flexible enough to cover that item, to the extent the contractor has incurred such costs as a result of the wrongful termination.

On the other hand, as we have already indicated, USF&G's costs of completing the three non-federal contracts, and the loss of Green's net worth, are not proper items for an equitable adjustment under the FOB and Training School contracts.

Training School contract (*Count II*): What we have said as to the FOB contract controls the Training School agreement. USF&G was not surety for that work and the petition therefore does not ask for recovery of amounts expended by the other surety (which is not a plaintiff here). But if the other surety has a claim, through Green, with respect to completion of the Training School comparable to that of USF&G for completion of FOB, the Training School equitable adjustment should take account of it if presented.

Defendant's motion to dismiss the petition is fully granted as to Count I, but as to Count II the court makes the following disposition: (a) the petition is dismissed to the extent that a claim for "breach" of the FOB and Training School contracts, triable in court, is stated; (b) the petition is construed as alternatively seeking equitable adjustments under those two contracts;[11] and (c) the request for such equitable adjustment is remanded to the GSBCA under P.L. 92-415, this opinion, and General Order No. 3 of 1972, for appropriate administrative proceedings. Counsel for the plaintiffs is designated as the responsible reporting attorney under paragraph 9(a) of General Order No. 3.

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[11] Count II demands, in the alternative, "such other relief as the court may deem appropriate."

APPENDIX B

In the United States Court of Claims

No. 124–72

[September 28, 1973]

WILLIAM GREEN CONSTRUCTION COMPANY INC. AND UNITED STATES FIDELITY & GUARANTY COMPANY

v.

THE UNITED STATES

Before COWEN, *Chief Judge,* DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges.*

ORDER

This case comes before the court on plaintiffs' motion, filed June 11, 1973, for a rehearing and partial reconsideration and on defendant's motion, filed June 18, 1973, for clarification, modification and reconsideration of the court's opinion issued May 11, 1973. Upon consideration thereof, together with the responses in opposition thereto, without oral argument,

IT IS ORDERED that the slip opinion entered herein on May 11, 1973, be and the same is amended and modified in that footnote 10 appearing on page

11 of the slip opinion is stricken and deleted and the following is inserted in lieu thereof:

> Plaintiffs allege, and the defendant has not denied, that USF&G has paid all laborers and material-men. We proceed, at this stage, on that assumption. It is clear that Green is liable to USF&G for the full amount of the loss suffered in completing the FOB contract.

IT IS FURTHER ORDERED that, except for the above modification and amendment of the said slip opinion, no further modification or amendment is to be made and that plaintiffs' motion, filed June 11, 1973, and defendant's motion, filed June 18, 1973, be and the same are denied.

BY THE COURT

WILSON COWEN,
Chief Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1153

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM GREEN CONSTRUCTION CO., INC.

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINION BELOW, JURISDICTION, AND STATUTE INVOLVED

The Government's Petition sets out the opinion below, jurisdiction of this Court, and the statute involved. Pet. 1-2.

QUESTIONS PRESENTED

The question presented in this case is not that stated in the Government's Petition. Rather, the questions presented are:

1. Whether, consistent with this Court's recognition in *United States* v. *Anthony Grace and Sons,* 384 U.S.

424 (1966) that the general rule for exhaustion of administrative remedies in Government contract cases is not inflexible in the face of exceptional circumstances, the decision below, remanding this case for evidentiary proceedings before the administrative appeals board, correctly held that under the facts presented, respondents' claim for relief could be pursued before the proper administrative board; and

2. Whether, under a reasonable interpretation of the Court of Claims opinion, the Government is free to contest and present evidence on all relevant issues of fact in the ordered remand proceeding before the General Services Administration Board of Contract Appeals.

STATEMENT

Two contracts between the respondent William Green Construction Co. ("Green") and the United States through the General Services Administration (GSA) are interrelated in this case. One of the contracts called for the construction of a women's dormitory at Howard University (the "Howard contract"); the other, for the construction of a United States Post Office and Federal Office Building at Portsmouth, New Hampshire (the "FOB contract").[1]

[1] For the limited purpose of the issue of exhaustion of administrative remedies raised by the Government's Motion to Dismiss, the facts included in the complaint and documents before the Court of Claims in support of the motions to reconsider must be accepted as correct. Accordingly, this statement is based on the opinion of the Court of Claims (all citations are to the opinion reprinted in Petition Appendix), the complaint, documents included in the Appendix to this brief which were before the Court of Claims, and the two opinions of the GSA Board of Contract Appeals, reported at 68-1 BCA ¶ 6883 (1968) and 71-2 BCA ¶ 9116 (1971).

About a year into each contract, in late 1965 and early 1966, GSA insisted that respondent perform certain work on the Howard contract which was impossible to perform, thereby precipitating the present dispute. The respondent, unable to perform on the Howard contract, was terminated for default on April 14, 1966. Five years later, the GSA finally conceded that that default termination was improper and erroneous. *William Green Construction Co., Inc.*, 71-2 BCA ¶9116 (GSBCA 1971).

Immediately following the improper termination of the Howard contract, the GSA compounded this wrong by taking the position that it would no longer make progress payments to respondent for work it was performing on the FOB contract. GSA's position was that respondent was or would be susbtantially indebted to the Government for liquidated damages and anticipated excess completion costs under the Howard contract, as a result of the default termination of that contract. The GSA advised Green that it was going to offset that claim against the future progress payments that Green was otherwise entitled to receive for work it was performing under the FOB contract. In effect, the GSA told Green that because of the Howard University termination, the GSA henceforth was not going to pay Green for its FOB work. At this point, Green was still performing the FOB contract and was not in default in any way under that contract.

Green immediately advised the GSA that, without the benefit of the progress payments specifically provided by the FOB contract, it would be financially unable to continue work on that contract, since those progress payments were needed to pay the laborers

and material suppliers on that contract. Accordingly, Green requested the GSA to isolate the dispute under the Howard contract from performance of the FOB contract. This request was denied by the GSA Administrator, who personally refused to treat the two contracts separately and who confirmed the decision to set off the Howard contract claim against the FOB contract progress payments. At that point, respondent was forced to abandon its FOB contract. This abandonment was subsequently formalized by a GSA letter terminating respondent's FOB contract. Following the GSA's termination of all of Green's federal contracts, Green was forced to go out of business. Pet. App. 2a-3a.

Green's performance bond surety on the FOB contract, respondent United States Fidelity & Guaranty Co. ("USF&G") was then required to pay the excess cost of completing the FOB contract. Under its bond and indemnity agreement, Green is liable to USF&G for this cost.

Since the heart of the dispute in this case was the wrongful default termination of the Howard contract, Green filed a prompt and timely administrative appeal from the Howard termination to the GSA Board of Contract Appeals. This appeal requested relief not only from the default termination of the Howard contract, but also for the resulting loss sustained under the FOB contract. Subsequently the GSA moved to dismiss from the administrative appeal proceeding the claim for losses under the FOB contract. The GSA Board of Contract Appeals granted the GSA motion and dismissed the FOB contract claim on the grounds that it was a claim for breach

of contract over which the Board had no administrative jurisdiction, 68-1 BCA ¶6883.

The administrative appeal, thus reduced, was contested by the GSA for five years. In 1971, the GSA finally conceded, by stipulation, that it had wrongfully terminated the Howard contract. 71-2 BCA ¶9116. The GSA Board of Contract Appeals then remanded that case to the Howard University contracting officer to determine the "equitable adjustment" (relief) to be granted Green under the Howard contract. Since that proceeding, which is still pending, no longer included a claim for the FOB losses, the GSA's stipulation and the Board's remand decision specifically provided that the remand "shall not be prejudicial to [Green's] right to proceed in the Court of Claims for additional damages not the subject of such equitable adjustment." 71-2 BCA ¶9116. Pursuant to that Board action, respondents instituted the present suit in the Court of Claims to recover the losses sustained under the FOB contract.

One further fact must be noted with respect to the Government's present claim that Green should have filed a separate administrative appeal under the FOB contract within thirty days after the Government officially terminated that contract. That is the fact that the GSA's letter terminating the FOB contract did not state, as required by the Federal Procurement Regulations for all "final", appealable decisions, that it was "made in accordance with the Disputes Clause [of the Contract] and shall be final and conclusive . . . unless within thirty days . . . a written notice of appeal . . . is mailed or otherwise furnished to the Contracting Officer." *See* 41 C.F.R. §1.1.318 (1965). Accordingly, the letter terminating

the FOB contract did not give Green the normal notice that the Government would be taking the position that all right to relief for losses under the FOB contract would be forfeited, unless in addition to appeal under the Howard contract, it also filed a separate appeal under the FOB contract.

In 1972, Green and USF&G brought suit in the Court of Claims for breach of the Howard and FOB contracts. Upon consideration of the Government's Motion To Dismiss, Judge Davis, writing for an unanimous court, held that Green's FOB claim was a claim under the contract, which should be presented to the GSA Board of Contract Appeals, rather than a claim for breach over which the Court of Claims would have original jurisdiction.[2] Accordingly the Court of Claims granted the motion insofar as the complaint alleged breach of contract. With respect to the claim for relief under the contract, the Court of Claims held that Green would have to exhaust its administrative remedy and accordingly remanded that claim to the GSA Board of Contract Appeals for an evidentiary hearing on the merits. The Court of Claims found that, under the circumstances, the absence of a formal separate appeal under the FOB contract within the normal 30-day period did not pre-

[2] It is essential to understand the differences between the two types of contractor claims. Breach of contract claims are redressable only in a court of law or equity. No administrative procedures precede their redress. On the other hand, any claim for "equitable adjustments" which may be made "under" the contract, must be pursued first with the contracting officer, and then before the appropriate administrative board, after which review by the Court of Claims takes place. *See United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963); *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966); *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966).

clude administrative consideration of the claim. The Court of Claims also found, upon the basis of the Government's concession of error in terminating the Howard contract and the still undisputed fact of the Government's refusal to pay under the FOB contract, that as a matter of law Green's abandonment of the FOB contract was excusable. Subject to this single basic legal finding, the Court of Claims' opinion returns the case to the GSA Board of Contract Appeals for necessary fact finding.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THE PRINCIPLES OF EXHAUSTION OF ADMINISTRATIVE REMEDIES ANNOUNCED BY THIS COURT.

The Government's contention that the decision below is in "direct contravention" to this Court's decision in *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, is premised upon the inaccurate suggestion that the general rule for exhaustion of administrative remedies in Government contract claims is absolute and inflexible. To the contrary, in *United States* v. *Anthony Grace & Sons, Inc.* this Court specifically recognized that in certain factual circumstances the general rule for exhaustion would not apply. 384 U.S. at 429-430. The decision below recognized and reaffirms the general rule, but found that the facts of this case brought it within a recognized exception.

Even in recognizing this particular case as the exception to the general rule, the Court of Claims did not go as far as it might have under the exception recognized by this Court in *Anthony Grace.* The Court of Claims did not allow Green to bypass its

administrative remedy as is suggested might be done by the above referenced portion of the *Anthony Grace* decision. To the contrary, the Court of Claims remand order requires Green to present its claim before the GSA Board of Contract Appeals. This is exactly what this Court did in *Anthony Grace.* In all respects, therefore, the Court of Claims decision is consistent with the rule established by this Court, and does not represent any expansion of Court of Claims jurisdiction. Indeed, by remanding the case to the GSA Board of Contract Appeals, the lower court has deferred to the jurisdiction of that body.

Other than applying the general rule so as to require Green to return to the GSA Board of Contract Appeals, all the Court of Claims held in this case was that the administrative remedy was still available for exhaustion, notwithstanding the absence of a separate appeal under the FOB contract within the normal 30-day period. This limited holding is consistent with a line of Court of Claims decisions, dating back to 1966, allowing resort to the administrative remedies after expiration of the 30-day period when exceptional circumstances warrant. *See, e.g., Robertson Electric Co.* v. *United States,* 176 Ct. Cl. 1287, 1301-1302 (1966); *Universal Ecsco Corp.* v. *United States,* 181 Ct. Cl. 10, 20-21, 385 F.2d 421, 427 (1967); *Schlesinger* v. *United States,* 181 Ct. Cl. 21, 24, 383 F.2d 1004, 1005-1006 (1967); *Zidell Exploration, Inc.* v. *United States,* 192 Ct. Cl. 331, 335-336, 427 F.2d 735, 737-738 (1970). All these cases, like *Anthony Grace,* recognize that equitable and practical considerations, of necessity, require some flexibility in the administrative procedure for resolving government contract disputes.

In arriving at this result the Court of Claims emphasized that Green had filed a timely appeal from the termination of the Howard contract and that in that appeal it did raise its claim for losses under the FOB contract, thereby bringing the entire factual dispute before the Appeals Board. "The three federal contracts were linked in plaintiff's mind and it may have considered the enlarged recovery it originally sought in the Howard administrative proceedings to be a sufficient method of covering all three determinations." Pet. App. 9a, 10a. The court further noted the GSA Board of Contract Appeal's dismissal of the FOB claim from the Howard appeal, on the Government's motion, for lack of jurisdiction and pointed out this dismissal did not occur until 1968 by which time "the time for appealing the FOB and Training School contracts had long expired." Pet. App. 10a, n. 4. The lower court also points out that in 1968 there was a temporary confusion in the law over which Government contract claims were claims for breach of contract, to be pursued only in the Court of Claims, and which were claims for relief "under the contract", to be pursued before the Boards of Contract Appeal. The Court of Claims stated that this case is a "prime examplar" of that confusion over the proper characterization of a particular claim and the ensuing selection of remedy. Although this confusion has since been cured so as to maximize the jurisdiction of the boards, the Court of Claims correctly recognized that such confusion existed in 1966 and should be taken into account here.

Under all of the facts and circumstances involved, the lower court's conclusion, that "since plaintiffs appear to have a valid right to substantial further

relief, they should not be eternally punished for their initial mistaken choice of procedure," is in no way exceptional.

Given the fact that the Court of Claims has long held that the 30-day appeals period is not invariably jurisdictional to board consideration of a dispute, it is only logical that the Court of Claims used the new provisions of P.L. 92-415 to remand the case to the GSBCA. In doing this, the Court of Claims did not expand its jurisdiction; we agree with the Government that P.L. 92-415 was not meant to do that. However, P.L. 92-415 was designed to allow the Court of Claims directly to place a case before the proper administrative forum, rather than have to suspend court proceedings while the parties themselves began the administrative process. *See* S.Rep. 92-1066, 92nd Congress, 2d Session; 1972 *U.S. Code Cong. and Admin. News* 3116, 3118-3119. It is thus clear that, in the present case, all the Court of Claims did was to follow the direction which this Court itself followed in *Anthony Grace,* by returning Green to the GSA Board of Contract Appeals for fact finding by that body.

II. THE DECISION BELOW IS LIMITED TO THE SPECIFIC FACTS AND CLAIMS OF THIS CASE AND DOES NOT IMPAIR THE ADMINISTRATIVE DISPUTES PROCEDURES FOR GOVERNMENT CONTRACT CLAIMS

The Government's petition bypasses two crucial facts. First, the Court of Claim's decision does not grant final relief to respondents. To the contrary, it remands this case to the General Services Administration Board of Contract Appeals for a hearing to determine what relief, if any, is appropriate. Second, Judge Davis was careful to point out that even this limited result was dictated by the particular facts of

this case. This is evidenced by note 5 of the Court's opinion in which Judge Davis pointed out that:

> "The cases in which we refused contractors a second choice—*Briscoe* v. *United States,* 194 Ct. Cl. 866, 887-88, 442 F.2d 953, 966 (1971); *Richardson Camera Co.* v. *United States,* 199 Ct.Cl. —, 467 F.2d 491 (Oct. 1972)—presented very different facts and circumstances." Pet. App. 10a.

The facts which the Court of Claims in this case considered to be "very different", including the interrelationship between the Green contracts, Green's appeal under Howard raising the FOB claim, the Board's belated dismissal of the FOB claim for lack of jurisdiction and finally, the temporary post-*Bianchi* confusion over classification of claims and selection of remedy, are not reoccuring ones. By limiting its decision to these facts, the court below carefully avoided stating any general rule or precedent.

The instant decision, therefore, will not in any way impair the integrity of the administrative disputes procedure or the Government's ability to settle disputes under Government contracts. The Court of Claims' decision actually strengthens this integrity by remanding this claim to the General Services Administration Board of Contract Appeals for an evidentiary hearing to determine what relief, if any, is appropriate under the contract in this case.

With respect to the suggestion that the Government will be disadvantaged by an administrative hearing at this date and that this is somehow the fault of respondents, it need only be pointed out that Green filed its appeal under the Howard contract in 1966, that the Government did not concede its error

in that case until 1971 and the present suit was brought shortly thereafter. It is also noteworthy that, eight years after filing, the Howard appeal is still pending before the General Services Administration Board. This delay in the administrative proceeding is not attributable to respondent or to the Court of Claims decision in this case.

III. THERE ARE GROUNDS INDEPENDENT OF THE COURT OF CLAIMS' REASONING WHICH MAKE THE DISPOSITION OF THIS CASE BY THE COURT BELOW CLEARLY CORRECT AND UNEXCEPTIONAL

A. There has been no valid appealable decision under the FOB contract which would initiate the 30-day appeals period

An alternate and independent ground for the Court of Claims' disposition of the case is the fact that the government has never issued a valid final decision under the FOB contract which would trigger the 30-day appeal period. This fact was brought to the Court of Claims' attention when both parties sought reconsideration from the Court of Claims. The letter terminating the FOB contract (App. 2a) did not state as a "final decision" by regulation must, that it was intended as a final decision under the "disputes" clause of the contract from which an appeal must be taken within 30 days. As a result of this failure to satisfy the specific regulatory requirements for a final contracting officer's decision, Green was never given the requisite notice that it must appeal.[3] Both the GSA Board of Contract Appeals and

---

[3] The regulation in effect at the time the contract was terminated was codified as 41 C.F.R. § 1-1.318, promulgated in 29 Fed. Register 10104, July 24, 1964 and is currently recodified as 41 C.F.R. § 1-1.318-1 (1973). It reads as follows:

(a) When a final decision of the Contracting Officer concerns a dispute that is or may be subject to the disputes clause, a

the Court of Claims have held that a decision which fails to comply with these notice requirements will not be regarded as final for purposes of effectuating the general appeal requirement. *Jacobson Construction Co.*, 66-2 BCA ¶6040 (GSBCA 1966); *Zidell Explorations, Inc.* v. *United States*, 192 Ct.Cl., 331, 336, 427 F.2d 735, 738 (1970).[4]

Although the Court of Claims chose to base its decision in this case on other grounds, this fact alone would require the same result. Indeed, the absence of a valid final decision in this case renders the whole issue of exhaustion of administrative appeal remedies moot.

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paragraph substantially as follows shall be included in the decision:

This decision is made in accordance with the Disputes Clause and shall be final and conclusive as provided therein, unless, within 30 days from the date of receipt of this decision, a written notice of appeal (in triplicate) addressed to the [title of the head of the agency] is mailed or otherwise furnished to the Contracting Officer. The notice of appeal, which is to be signed by you as the contractor or by an attorney acting on your behalf, and which may be in letter form, should indicate that an appeal is intended, should refer to this decision, and should identify the contract by number. The notice of appeal may include a statement of the reasons why the decision is considered to be erroneous.

[4] The cases cited by petitioner at 11, n.7, of its petition are completely distinguishable. In both *United States* v. *Ulvedal*, 372 F.2d 31 (8th Cir. 1967), and *United States* v. *Peter Kiewit Sons, Inc.*, 345 F.2d 879 (8th Cir. 1965), there were formal notices of a final contracting officer's decision; and the notices spelled out, as per the regulation in note 3, *supra*, exact appeal rights and time limits. In *United States* v. *Hammer Contracting Corp.*, 331 F.2d 173 (2d Cir. 1964), no such formal notice appears to have been given to the contractor; however, the contract predated 1964, when the regulation cited above was issued.

B. Other independent grounds support the Court of Claims disposition of the case

At least three other independent reasons exist for denying the Government's Petition. These in brief are:

(1) Green's timely appeal under the Howard contract, which included its FOB claim, constituted a constructive appeal under the FOB contract, particularly since the Government's refusel to pay under the FOB contract was premised solely on its termination of the Howard contract. Certainly the Howard appeal, including the claim for resulting losses under the FOB contract, gave the Government timely notice of that claim and an immediate opportunity to resist it before the Board.

(2) The Government is equitably estopped from contesting the timeliness of the FOB contract appeal to the GSA Board. By arguing strenuously before the GSA Board in the Howard appeal that all claimed losses under the FOB contract were "breach" claims redressable only in the Court of Claims (see *supra*, at 2-3), the Government should not now be allowed to argue to the contrary that these claims were redressable only before the Board of Contract Appeals which, on the Government's motion, originally dismissed them.

(3) Green's claims for losses under the FOB contract, based upon the Government's refusal to pay, is one which traditionally has been regarded as a breach of contract claim, not requiring *any* exhaustion of administrative remedies, and accordingly, the Government's motion to dismiss should have been denied completely. *See* the cross-petition for certiorari filed by Green and USF&G, February 25, 1974.

IV. THE DECISION BELOW DOES NOT PRECLUDE THE GOVERNMENT FROM CONTESTING ANY RELEVANT FACTS IN THE REMAND PROCEEDINGS BEFORE THE GENERAL SERVICES BOARD OF CONTRACT APPEALS

Reasonably interpreted, within the procedural context in which it was rendered, the Court of Claims decision does not make any final findings as to disputed facts or preclude the Government from contesting any relevant facts in the proceedings before the GSA Board of Contract Appeals, pursuant to the court's remand. The only two critical facts are indeed undisputed. They are, first, the fact that the Government's termination of the Howard contract was wrongful by the Government's admission, and, second, the fact that upon the basis of the wrongful termination of Howard, the Government took the position that it was not going to make further payments to Green under the FOB contract. Even the Government's Petition concedes these two facts, as it must. The Court of Claims properly recognized that under the most fundamental principles of contract law, one party's refusal to pay for work under a contract excuses the other from further performance. "It follows, we think, that Green's refusal to proceed on FOB must now be held to be excused . . . . Construction contractors cannot be expected to continue working if the Government improperly holds back on substantial interim payments which enable the project to proceed. *Cf. Litchfield Mfg. Corp.* v. *United States,* 167 Ct.Cl. 604, 338 F.2d 94 (1964); *Pigeon* v. *United States,* 27 Ct. Cl. 167, 175-76 (1892); *Overstreet* v. *United States,* 55 Ct.Cl. 154, 173-74 (1920)." Pet. App. 11a [Footnote omitted]. This conclusion is one of law and is so firmly established as to be unassailable.

Beyond this point, a reasonable interpretation of the lower court's opinion leaves all facts to be determined by the GSA Board of Contract Appeals and subject to contest and presentation of relevant evidence by the Government. The Court of Claims' opinion and remand order clearly require respondents to prove all costs and damages sustained as a result of the termination of the FOB contract. Other factual references in the Court of Claims' opinion must be considered within the procedural context of a Motion of Dismiss and viewed as assumptions for purposes of dealing with the legal issues raised by the Motion—not as final findings of facts which the Government might legitimately dispute. This is most clearly evidenced by the Court of Claims' Order on the Government's Motion for Reconsideration in which the Court of Claims, after noting a factual allegation which the Government had not denied, stated "We proceed *at this stage* on that *assumption.*" Pet. App. 14a [Emphasis added] This is not the language used for final findings of fact. Rather it simply connotes the ordinary assumption made in considering motions to dismiss—assumptions which must be supplemented by proof and are subject to evidentiary challenge in the ensuing evidentiary proceeding before the administrative board.

In short, properly read within its procedural context, the decision below does not make findings on disputed material facts without evidence. Nor does it usurp the fact finding function of the GSA Board of Contract Appeals in the remand proceeding. To the extent the Government has a legitimate basis for opposing respondents' claim in this case, it will have a full and fair opportunity for doing so in the sched-

uled remand proceeding before the administrative tribunal.

CONCLUSION

The decision below is correct for the reasons stated by the Court of Claims and for additional reasons including those mentioned above. Subject to the fundamental rules of evidence, the Government is free to raise and present evidence on any relevant defense in the scheduled remand proceeding before the General Services Administration Board of Contract Appeals. Interim remand to the Court of Claims on this issue would serve no useful purpose and would only further delay the administrative proceeding.

For the foregoing reasons respondents submit that the Petition in this case should be denied.

Respectfully submitted,

MICHAEL J. MALLEY
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Of Counsel:

STANLEY C. MORRIS, JR.
JAMES V. DOLAN
VIRGINIA M. DONDY
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

February, 1974

APPENDIX

WILLIAM GREEN CONSTRUCTION CO., INC.
BUILDING CONSTRUCTION
23 GREEN STREET
HUNTINGTON, L.I., NEW YORK

May 18, 1966

Commissioner of Public Building Services
General Services Administration
19th & F Streets
Washington, D.C.

Attention: Mr. Casper F. Hegner

Mr. Phillip A. Lynn, Chief Design and
Construction Division
Public Buildings Service
General Services Administration
Post Office Building
Boston, Mass.

Re: General Services Administration
Region No.—Boston, Mass.
Contract No. GS-01B-PCC-0234
Project No. 27902
Construction—Post Office and Federal
Office Building, Portsmouth, New Hampshire

Gentlemen:

Please be advised that we are unable, because of financial circumstances, due to potential unresolved claims relating to another project (Project No. 49233, Women's Residence Hall No. 7, Howard University, Washington, D.C.) to progress or complete the work under the above-entitled contract; and thereby waive any and all notices of termination or default required under the above-entitled contract.

We hereby authorize you and our surety to relet or have the work completed in accordance with all rights and remedies under the contract, and bond and all laws applicable thereto without further notice to us.

Very truly yours,

WILLIAM GREEN CONSTRUCTION CO., INC.

By /s/
Secretary-treasurer

May 23, 1966

REGISTERED MAIL—RETURN RECEIPT REQUESTED

William Green Construction Co., Inc.
23 Green Street
Huntington, Long Island, New York
1PC, U.S. Post Office and Federal Office Building,
Portsmouth, New Hampshire, GS-01B-PCC-0234

Gentlemen:

This will acknowledge receipt of your letter of May 18, 1966, on the above subject, advising of your inability because of financial and other reasons to progress or complete the contract.

Under the provisions of Clause 5 of the General Provisions (Standard Form 23-A), your right to proceed thereunder is hereby terminated effective immediately.

Your surety, United States Fidelity and Guaranty Company, is being notificed concurrently of this action.

An inventory inspection will be arranged as soon as possible among all concerned parties at a time mutually agreeable to all.

The Government reserves all rights as provided in said Clause 5 of the General Provisions (Standard Form 23-A) and all other rights as provided in the contract.

Sincerely yours,

/s/
Philip A. Lynn
Chief, Design and Construction Division
Public Buildings Service

cc:
United States Fidelity & Guaranty Company, 100 Maiden Lane, New York, N.Y.
Assistant Commissioner for Construction, PBS, Washington, D.C.—PC
Director, Construction Division, PBS, Washington, D.C.—PCC
Office of General Counsel, Washington, D.C. (Att. Mr. Leo Freemen)—LB
Regional Director, PBS—1P
Regional Counsel—1L
Performance file (Wm. Green Construction Co., Inc.)—PC
Official file—1 PCC
Reading

1PC:JJDonoghue:mim 5-23-66

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1153

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM GREEN CONSTRUCTION COMPANY, INC. and UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondents.

AMICUS CURIAE BRIEF OF ST. PAUL FIRE AND MARINE INSURANCE COMPANY IN OPPOSITION TO THE PETITION OF THE UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

EUGENE F. BRADY
Counsel of Record

HART & HUME, *Of Counsel*
10 East 40th Street
New York, New York 10016
(212) 686-0920

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Statement of Interest of St. Paul Fire and Marine Insurance Company

This brief is filed with the consent of the parties pursuant to Rule 42(1) of this Court. The letters of consent have been filed herewith.

We represent St. Paul Fire and Marine Insurance Company ("St. Paul"). The decision below[1] directly affects

1. *William Green Construction Company, Inc. and United States Fidelity and Guaranty Company* v. *United States*, —— Ct. Cl. ——, 477 F.2d 930 (1973).

the interests of St. Paul, and this brief respectfully is submitted to advise this Court of St. Paul's interests in this matter, and respectfully to urge, for the reasons set forth below, that the petition of the Government for a writ of certiorari be denied.

St. Paul, as surety, issued Miller Act performance and payment bonds on behalf of William Green Construction Company, Inc. ("Green"), as principal, to the Government, as obligee, in connection with Green's contract with the Government for the construction of the National Training School for Boys, Morgantown, West Virginia ("Training School contract"). Upon the termination for default by the Government of the Training School contract, St. Paul, under a written "Takeover Agreement" with the Government, arranged for the completion of the Training School contract by another contractor. St. Paul has sustained a substantial loss under its bonds for excess completion costs and labor and material claims.

The Court of Claims held, below, that if St. Paul, as surety on the Training School contract, had sustained a loss under its bonds, it was entitled to an equitable adjustment under the contract. The Court of Claims held:

> "What we have said as to the FOB contract controls the Training School agreement. USF&G was not surety for that work and the petition therefore does not ask for recovery of amounts expended by the other surety (which is not a plaintiff here). But if the other surety has a claim, through Green, with respect to completion of the Training School comparable to that of USF&G for completion of FOB, the Training School equitable adjustment should take account of it if presented." (*Green* v. *U. S.*, *supra* note 1, at 938)

Following the decision of the Court of Claims below, an appeal, on behalf of Green and St. Paul, from the termination for default of the Training School contract was filed with the General Services Board of Contract Appeals. Proceedings on that appeal, however, have, in effect, been suspended pending the determination of this petition.

ARGUMENT

Certiorari is inappropriate to consider mere technical objections to a manifestly equitable decision of narrow application.

It respectfully is submitted that the Government's petition should be denied because

(1) the decision of the court below does not give rise to any "special and important reasons" as required for review by this Court (U. S. Sup. Ct. Rule 19(1)); and

(2) the granting of certiorari would involve this Court in an attempt by the Government to avoid, on purely technical and procedural grounds, the consequences of its admittedly mistaken conduct.

The decision below is nothing more than a fair and equitable resolution of a unique set of circumstances. It is a decision of very narrow application and not, as the Government claims (Gov't. Pet., p. 9), an expansion of the jurisdiction of the Court of Claims or an attack on the administrative disputes settlement process.

The essence of the decision below is that the Government will not be permitted, on technical and procedural

grounds, to avoid paying compensation to those whom it injures by its mistaken conduct. It seems evident that not only are there no "special and important reasons" for review, but on the contrary, that there are "special and important reasons," *viz.*, fairness and equity, to allow the decision to stand.

The "Question Presented" by the Government (Gov't. Pet., p. 2) involves technical points designed merely to overcome responsibility for admittedly mistaken conduct on its part. It seems unarguable that the admitted wrongful termination of the Howard University contract, coupled with the subsequent threats of set-off, which forced the termination of the FOB and Training School contracts which were then in progress, constitute actionable wrongs.

However, instead of seeking ways to ameliorate the impact of its conduct, the Government has sought to avoid its responsibility by retreat into the maze created by the confusion as to whether a particular claim of a government contractor is "under the contract" or for "breach". (*See, Green* v. *U.S., supra* note 1, at 937.) The Government, by first arguing before the General Services Board of Contract Appeals that the instant claims were "breach" claims not cognizable by the Board, and now by arguing that the claims should have been determined administratively, seeks to avoid the substance of the case, although it is apparent that, procedural jousting aside, fairness requires that the Government be held accountable in damages for its conduct in this case.

Those dealing with the Government have a right to expect fair dealing. *See, S&E Contractors* v. *United States,*

406 U. S. 1, 10. This is especially true as respects disputes arising out of government contracts where the Government is not only a contracting party, but also the arbiter of contract disputes. *See, United States* v. *Wunderlich,* 342 U.S. 98, 101-103 (Douglas and Reed, and Jackson, JJ., dissenting). Any definition of fair dealing must include the concept that the Government ought not to be relieved of the consequences of its admittedly mistaken conduct solely on dubious technical or procedural grounds, even assuming, *arguendo,* that there might be some colorable basis for its contentions.

It respectfully is submitted that certiorari is not intended for review of such technical objections to a manifestly fair decision of particular application. In any event, the Court of Claims was well within its authority in sweeping aside the Government's procedural objections as is amply shown in the brief of the respondents in opposition to the petition. Apart from the clear equity and legal soundness of the decision of the Court of Claims, it respectfully is submitted that, in view of the special circumstances of this case, *viz.,* Green's forced default on the Training School contract, there really was no "dispute concerning a question of fact arising under this contract" and thus no true "final decision" of the Contracting Officer.[2] Accordingly, an appeal pursuant to the disputes clause was not indicated and the Government's contentions that the failure to follow the technical requirements of the disputes clause was fatal are inapposite.

---

2. The "Disputes" clause of the Training School contract is set forth in full in the Government's petition, fn. 4, pp. 9-10.

Summary

The Court of Claims was correct, and fair, in sweeping aside the technical-procedural arguments resorted to by the Government in an attempt to avoid compensating Green and its sureties for damages clearly and unequivocally connected to the Government's admitted mistaken termination of the Howard University contract, its undisputed threats of set-off on the FOB and ~~its~~ Training School contracts which were both then in progress, and its termination of those contracts. Further, certiorari should not be available to review a manifestly fair decision of narrow applicability solely on technical-procedural grounds.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

EUGENE F. BRADY
Counsel of Record

HART & HUME, *Of Counsel*

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1153

UNITED STATES OF AMERICA, *Petitioner,*

v.

WILLIAM GREEN CONSTRUCTION CO., INC. *et al.*
Respondents.

No. 73-1314

WILLIAM GREEN CONSTRUCTION CO., INC. *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

SUPPLEMENTARY BRIEF OF PETITIONER IN NO. 73-1314 AND RESPONDENT IN NO. 73-1153

MICHAEL J. MALLEY
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Of Counsel:

STANLEY C. MORRIS, JR.
JAMES V. DOLAN
VIRGINIA M. DONDY

STEPTOE & JOHNSON
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

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UNITED STATES OF AMERICA, *Respondent.*

SUPPLEMENTARY BRIEF OF PETITIONER IN NO. 73-1314 AND RESPONDENT IN NO. 73-1153

Pursuant to Rule 24(5), Respondent in No. 73-1153 and Petitioner in No. 73-1314, respectfully calls the Court's attention to the case of *National Factors, Inc. v. United States,* Court of Claims No. 93-63, decided March 20, 1974.

In that case, the Court of Claims decided that:

> the termination of a contract for the convenience of the government is valid only in the absence of bad faith *or a clear abuse of discretion.* Slip op. at 4 [emphasis added].

The clear implication of this holding is that where the Government's termination of a contract is a clear abuse of discretion, there is a breach of contract over which the Court of Claims has *de novo* jurisdiction under *United States* v. *Anthony Grace & Sons,* 384 U.S. 424 (1966). The *National Factors* decision is important to the disposition of the two petitions before this Court because it highlights the fact that, under normal doctrines of Government contract law, a clear abuse of discretion cannot be used to convert a wrongful termination into a termination for the convenience of the Government. A wrongful termination in such a case remains what it has always been: a breach of contract redressable only in the Court of Claims.

Green's opposition to the Government's petition in No. 73-1153 points out that there are independent grounds for supporting the Court of Claims' disposition. One of those grounds is that the Court of Claims should have completely denied the Government's motion to dismiss, because Green's petition on its face alleges a breach of contract to which the doctrine of exhaustion of administrative remedies is inapplicable, (Brief in opposition at 14). The facts alleged in Green's complaint in the Court of Claims in this case are sufficient to require a finding that the Government's action resulting in termination of the FOB contract was a clear abuse of discretion and thus is a breach of contract. Specifically, it was alleged that the Government was told that Green would complete FOB, which was

guaranteed by USF&G's performance and payment bonds and that the Government was warned that a set-off of its Howard contract claim against the FOB contract would inevitably bankrupt Green and result in abandonment of the FOB contract.

In its cross-petition in No. 73-1314 which is conditioned upon this Court's action on the Government's petition, Green seeks direct review of that portion of the Court of Claims' opinion rejecting Green's breach of contract claim. That petition contends that the concept of termination for the convenience of the Government cannot and should not be stretched so far as to cover cases (such as FOB) where the contract is not in default, the Government wants, indeed, demands, completion of the contract, and the Government itself acts in such a fashion as to make completion impossible. In *National Factors, supra,* the Court of Claims now appears to have recognized this principle in holding that a breach claim was maintainable in that case. For that reason Green wishes to bring this recent decision of the Court of Claims to this Court's attention.

Respectfully submitted,

MICHAEL J. MALLEY
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Of Counsel:

STANLEY C. MORRIS, JR.
JAMES V. DOLAN
VIRGINIA M. DONDY

STEPTOE & JOHNSON
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

April 23, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1153

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GREEN CONSTRUCTION CO., INC., AND UNITED STATES FIDELITY AND GUARANTY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY MEMORANDUM FOR THE UNITED STATES

Petitioner William Green Construction Co. ("Green") correctly observes (Br. in Opp., Point III, A, pp. 12-13) that the termination notice on the FOB contract did not contain a statement that it was a final decision, nor did it set out the contractor's appeal rights. However, Green itself, specifically and in writing, waived all notice requirements. On May 18, 1966, Green wrote to the GSA that it was discontinuing work on the FOB project, and that it "waive[d] any and all notices of termination or default required under the * * * contract" (Br. in Opp. App., pp. 1a-2a). Moreover, since Green wasat that time processing an administrative appeal of the termination of the Howard contract, pursuant to a notice fully setting out its rights, and since the letter of June 9, 1966 terminating the Training School contract contained a full statement of the appeal

rights available in default-termination cases, Green was fully apprised of its administrative appeal rights and could not, therefore, have sustained any prejudice.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

DOJ-1974-05